

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KEVIN W. TERRELL,

Petitioner,

v.

WARDEN, USP-ATWATER,

Respondent.

Case No. 1:22-cv-00305-CDB (HC)

**ORDER GRANTING RESPONDENT'S
MOTION TO DISMISS**

(ECF No. 12)

Before the Court is Respondent's Motion to Dismiss, filed November 4, 2022. (ECF No. 12).

Pursuant to the Court's Order Setting Briefing Schedule and consistent with Rule 4 Governing Section 2254 cases,¹ Petitioner had twenty-one (21) days after Respondent filed the Motion to Dismiss to file Petitioner's opposition or statement of non-opposition. As of November 29, 2022, Petitioner has made neither filing. Therefore, under Eastern District of California Local Rule 230(c) the Court construes Petitioner's failure to timely oppose as a non-opposition to the motion. Accordingly, the matter is fully submitted, and the Court grants

¹ The Rules Governing Section 2254 Cases may be applied to petition for writ of habeas corpus other than those brought under § 2254 at the Court's discretion. See Rule 1 of the Rules Governing Section 2254 Cases. Civil Rule 81(a)(4) provides that the rules are "applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice of civil actions." Fed R. Civ. P. 81(a)(4).

1 Respondent's Motion to Dismiss on its merits.

2 **I. Procedural and Factual Background**

3 On March 16, 2022, Petitioner, a Bureau of Prisons (BOP) inmate currently incarcerated
4 in Atwater, California, filed a 28 U.S.C. § 2241 petition for habeas corpus seeking relief from
5 sanctions imposed on him for a BOP code 113 violation (possession of illicit drugs) at FCI-
6 Butner on July 25, 2019.

7 Petitioner's illicit drug possession violation occurred during his service of his 100-month
8 prison sentence following his conviction in the Southern District of West Virginia for felon in
9 possession of a firearm in violation of 18 U.S.C § 922(g). According to prison records, Petitioner
10 confessed to possessing illicit synthetic cannabis oil drug doses. (ECF No. 12, Appx. p. 22).
11 Petitioner claims that he was never given a written statement of reasons as to why he was found
12 guilty of his illicit drug possession, which he argues violates *Wolff v. McDonnell*, 418 U.S. 539
13 (1974). Petitioner seeks relief in the form of restoring his good time credit, and expungement of
14 "incident report #330582." (ECF No. 1, p. 5).

15 **II. Discussion**

16 In *Wolff*, the Supreme Court held that prison disciplinary hearings are required to have
17 five elements to meet procedural due process requirements. They are: (1) written notice of the
18 charges no less than 24 hours before the hearing; (2) an opportunity to present witnesses and
19 documentary evidence; (3) an impartial hearing body; (4) assistance for illiterate inmates or in
20 complex cases; and (5) a written statement of the evidence relied upon, as well as reasons for the
21 sanction. *Wolff*, 418 U.S. 563-567.

22 Respondent asserts that Petitioner did receive proper procedural due process and claims
23 that dismissal is appropriate because Petitioner failed to exhaust all available judicial and
24 administrative remedies before he filed his § 2241 petition. *Ward v. Chavez*, 678 F.3d 1042, 1045
25 (9th Cir. 2012). Exhaustion is not a "jurisdictional prerequisite," but generally can be only waived
26 if "pursuing those administrative remedies would be futile." *Id.*

27 To exhaust available administrative remedies, an inmate must proceed through the
28 administrative remedy process. 28 C.F.R. §§ 542.10-542.19. First the inmate must seek informal

1 resolution of the issue at their institution of confinement. *Id.* § 542.14. If the informal process
2 fails, the inmate must file a formal request with the Warden. *Id.* If the Warden denies a remedy,
3 the inmate may appeal to the Regional Director, within 20 days of receiving the Warden's
4 response, and then to the General Counsel within 30 days of the Regional Director's response. *Id.*
5 § 542.15.

6 Petitioner claims that there was a due process error because he did not receive a timely
7 copy of the final Disciplinary Hearing Officer (DHO) written decision determining that has
8 violated BOP's Disciplinary code, filed October 31, 2019. Respondent points to the record,
9 which indicates that Petitioner did in fact receive the DHO decision as he filed two
10 Administrative Remedy appeals, challenging incident report number 3305832. The Regional
11 Director did address Petitioner's Administrative remedy appeal and found that he had been
12 afforded due process. (ECF No. 12, Appx pp. 5-7). Petitioner has not appealed the Regional
13 Director's decision to the General Counsel, and thus has not exhausted his administrative
14 remedies. *Id.*

15 The Court finds that the record is consistent with Respondent's assertions that Petitioner
16 did indeed appeal to the Regional Director, and he received a written denial of his appeal. (ECF
17 No. 12, Appx at pp. 41-46). Furthermore, the uncontradicted record reflects that Petitioner did
18 admit that report number 330582 was accurate. *Id.* at pp. 47-48.

19 **III. Conclusion and Order**

20 Accordingly, for the reasons set forth above, the Court ORDERS that Respondent's
21 Motion to Dismiss is GRANTED, and Petitioner's Petition for Habeas Corpus is DENIED.
22 IT IS SO ORDERED.

23 Dated: November 30, 2022


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UNITED STATES MAGISTRATE JUDGE
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